

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

JAMES D. JOHNSON, as next friend to
Olivia Y., et al.

PLAINTIFFS

vs.

CIVIL ACTION NO. 3:04cv251LN

HALEY BARBOUR, as Governor of the
State of Mississippi, et al.

DEFENDANTS

**DEFENDANTS' MOTION FOR LEAVE TO SUPPLEMENT
DEFENDANTS' INITIAL DISCLOSURES**

Pursuant to Rules 26(a)(1)(B) and 26(e)(1) of the Federal Rules of Civil Procedure, Haley Barbour, as Governor of the State of Mississippi, Donald Taylor, as Executive Director of the Mississippi Department of Human Services, and Rickie Felder, as Director of the Division of Family and Children's Services ("Defendants") respectfully move this court for leave to supplement Defendants' Initial Disclosures with the disclosure of the following documents:

- 1) House Bill No. 1576 (Bates No. DHS 146268-146281), attached hereto as Exhibit "A";
- 2) MDHS FY 2008 Budget Request to the Mississippi Legislature (Bates No. DHS 146282-146363), attached hereto as Exhibit "B";
- 3) Executive Budget Recommendation Fiscal Year 2008 to the Mississippi Legislature (Bates No. DHS 146364-146383), attached hereto as Exhibit "C";
- 4) June 30, 2006 letter from Williams to Taylor re: Program Improvement Plan ("PIP") approval and enclosing approved PIP effective April 1, 2006 (Bates No. DHS 146384-146540), attached hereto as Exhibit "D";

- 5) October 31, 2006 letter from Felder to Pike re: 1st Quarterly Report (April 1, 2006-June 30, 2006) and 2nd Quarterly Report (July 1, 2006-September 30, 2006) (Bates No. DHS 146541-146785), attached hereto as Exhibit “E”; and
- 6) Mississippi FY 2006 Annual Progress and Services Report (APSR) dated November 2006 (Bates No. DHS 146786-146943), attached hereto as Exhibit “F”.

Defendants respectfully request that this court waive the requirement for a separate memorandum of authorities, as required under Local Rule 7.2(D), and accept the following in support of this Motion.

BACKGROUND

This court’s January 17, 2006 Order set a discovery cut-off date of April 17, 2006, a pretrial date of July 17, 2006, and a trial date of August 7, 2006. Pursuant to this court’s November 13, 2006 Order, the pretrial conference has been rescheduled for February 26, 2007, and trial has been postponed until May 7, 2007. Since the discovery cut-off date, certain events have transpired and certain documents have been completed that should be allowed into evidence in order to provide a complete resolution of the issues in this lawsuit. This evidence directly addresses whether or not Defendants have acted deliberately indifferent or outside the bounds of professional judgment to Plaintiffs’ constitutional rights and whether or not Plaintiffs are entitled to an injunction.

Plaintiffs will suffer no prejudice with the supplementation of these documents. The filing of Defendants’ Supplemental Disclosures will not raise new issues, will not require new discovery, will not prolong the litigation, and will not prejudice the rights of Plaintiffs. **All of the documents that Defendants seek to disclose are documents that Plaintiffs knew would**

be completed after the discovery cutoff and/or are merely supplements to documents and/or testimony that Plaintiffs received during the discovery process.

In *Farmer v. Brennan*, the United States Supreme Court held it was proper to allow post-discovery developments to establish that the plaintiffs were not entitled to an injunction. 511 U.S. 825, 846 (1994); *see also Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984) (court reversing district court's exclusion of evidence discovered after the discovery cutoff date); *El Tabech v. Gunter*, 922 F. Supp. 244, 253 (D. Neb. 1996) (on remand, court relying on evidence developed over one year after trial in case to support decision that defendants knew of risk of plaintiffs) (citing *Farmer*, 511 U.S. at 846). "The purpose of a discovery cutoff date is to protect the parties from a continuing burden of producing evidence and to assure them adequate time to prepare [for] trial." *Whittaker Corp.*, 736 F.2d at 1347 (citing *King v. Georgia Power Co.*, 50 F.R.D. 134, 135-36 (N.D. Ga. 1970), *aff'd in part and vacated in part on other grounds, sub nom. United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), *vacated and remanded on other grounds, sub nom. Local Union 84, IBEW v. U.S.*, 456 U.S. 952 (1982)). This court allowing Defendants to supplement their disclosures after the discovery cutoff date of April 17, 2006 does not disrupt either of these purposes. Defendants are not seeking any additional discovery of Plaintiffs, and the trial in this matter is scheduled to commence over three months from the date of this Motion.

ARGUMENT

During the discovery process, Defendants produced House Bill No. 1576, as it was passed by the Mississippi Legislature. On April 18, 2006, one day after the discovery deadline, Governor Haley Barbour signed this bill into law. Defendants now seek to produce this signed and executed copy of House Bill No. 1576, Exhibit "A".

Also during the discovery process, Defendants produced extensive documents related to the annual budgeting process in which all State agencies participate. Plaintiffs conducted numerous depositions regarding this budgeting process, and several deponents, including Defendants Taylor and Felder, testified about their intentions regarding MDHS' forthcoming FY 2008 budget request. MDHS submitted its FY 2008 Budget Request to the Mississippi Legislature on July 30, 2006. As further proof that the information contained in this budget request is not prejudicial to Plaintiffs, both Dr. Bill Brister, Plaintiffs' financial expert, and Stephen Leech, counsel for Plaintiffs, were present during the FY 2008 MDHS Legislative Budget Committee Hearing where the FY 2008 Budget Request was presented by MDHS to the Legislative Budget Committee. Additionally, the Governor of the State of Mississippi is statutorily required to submit an annual budget recommendation to the Mississippi Legislature. During the discovery process, Defendants submitted seven prior such budget recommendations covering FY 2000 through FY 2006. Governor Barbour presented his FY 2008 budget recommendation to the Mississippi Legislature on November 14, 2006. This Executive Budget Recommendation is a public document and has been posted on the Governor's website, www.governorbarbour.com, since it was released. Defendants now seek to produce both the MDHS FY 2008 Budget Request, Exhibit "B", and the Executive Budget Recommendation for FY 2008, Exhibit "C".

During the discovery process, Defendants produced extensive documentation of the Child and Family Services Review process conducted on DFCS by the federal government. This process involved DFCS conducting a self-assessment, the federal regulators conducting an on-site review, and finally the development of a PIP to address any areas for which DFCS was found to be out of substantial conformity, a process that many of the other states sued by

Plaintiffs' counsel have gone through. In April 2005, the federal regulators approved DFCS' PIP, and this PIP was produced to Plaintiffs during discovery. However, after the devastating effects of Hurricane Katrina, DFCS and the federal regulators renegotiated the PIP during January and February 2006. Prior to the discovery cutoff, Defendants produced to Plaintiffs a copy of the renegotiated PIP dated March 31, 2006. After the discovery cutoff, Defendants were required to submit another version of the renegotiated PIP on May 1, 2006, to address a few issues raised by the federal regulators. On June 30, 2006, the federal regulators approved the renegotiated PIP effective April 1, 2006, and on October 31, 2006, DFCS submitted a quarterly report on their progress with the renegotiated PIP. Both the renegotiated PIP and the quarterly report are public documents and have been available on MDHS' website since released. Defendants now seek to produce a finalized version of the renegotiated PIP, Exhibit "D", and the quarterly report, Exhibit "E".

Finally, MDHS is statutorily obligated to submit annual reports to the federal government on its compliance with its Child and Family Services Plan. During the discovery process, Defendants produced a copy of MDHS' Child and Family Services Plan, covering the period of October 1, 2004 through September 30, 2009, and two annual reports. In November 2006, MDHS issued its annual report covering its compliance with the Child and Family Services Plan for FY 2006 – July 1, 2005 through June 30, 2006. This annual report is a public document and has been posted on MDHS' website, www.mdhs.state.ms.us, since it was released. Defendants now seek to produce this updated annual report, Exhibit "F".

WHEREFORE, Defendants respectfully request that the court grant Defendants' Motion for Leave to Supplement Defendants' Initial Disclosures.

This the 30th day of January, 2007.

Respectfully submitted,

**HALEY BARBOUR, as Governor of the State of
Mississippi; DONALD TAYLOR, as Executive Director
of the Department of Human Services; and
RICKIE FELDER as Director of the Division of
Family and Children's Services**

BY: /s/ Dewitt L. ("Rusty") Fortenberry, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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I also certify that I have this day served a copy of the foregoing on the following non-ECF participants by United States Mail, postage prepaid:

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SO CERTIFIED, this the 30th day of January, 2007.

/s/ Dewitt L. ("Rusty") Fortenberry, Jr.